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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The

Supreme Court

of the

United States

October Term, 1998

GLENN V. ELLIS,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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42 pp

QUESTION PRESENTED FOR REVIEW

I.

Whether the Petitioner's ex post facto protections were violated by the application of the one-year time limit of the Anti-terrorism and Effective Death Penalty Act of 1996, effectively eliminating his right under 28 USC § 2255 to challenge his criminal conviction and sentence which had become final more than a year before the effective date of the Act?

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The Petitioner, Glenn V. Ellis respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Sixth Circuit, issued on September 10, 1998, and affirmed on a petition for rehearing, entered in the above-entitled proceeding on January 11, 1999.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit denying the Petitioner's Petition for Rehearing was not published, but is attached hereto as Appendix 1. The Sixth Circuit opinion denying the Petitioner's appeal from the dismissal of his motion under 28 USC § 2255 was not published, but is attached hereto as Appendix 2. The district court's order denying the Petitioner's motion for reconsideration was not published, but is attached hereto as Appendix 3. The

district court's order dismissing the Petitioner's motion under 28 USC § 2255 was not published, but is attached hereto as Appendix 4.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 11, 1999. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISIONS INVOLVED

Article 1 § 9 of the United States Constitution provides in pertinent part:

"No Bill of Attainder or ex post facto Law shall be passed."

STATEMENT OF THE CASE

On February 15, 1989, a grand jury sitting for the Western District of

Michigan returned an indictment, charging the Appellant with violations of 21 USC §§ 841 and 846, 18 USC § 2 and 18 USC §§ 1956 and 1961. A second superseding indictment was returned on August 15, 1991.

The Appellant appeared before the Honorable Judge Douglas Hillman for the start of his jury trial on April 15, 1992. On April 20, 1992, the jury returned a verdict of guilty on one conspiracy count, three counts of possession with intent to distribute, and one money laundering count. The Petitioner was found not guilty on the remaining counts of the superseding indictment.

The Petitioner appeared for sentencing on August 13, 1992. At that time, Judge Hillman imposed concurrent sentences of 240 months on the counts of conviction. The Petitioner's appeal to the Sixth Circuit Court of Appeals was denied on March 28, 1994.

On April 25, 1997, the Petitioner's

motion under 28 USC § 2255 was filed with the District Court for the Western District of Michigan. On July 3, 1997, the District Court entered an order denying the motion, finding that it was untimely under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA. (Appendix 4, District Court Order, 7/3/93) Upon a motion to reconsider filed on July 10, 1997, the District Court affirmed its earlier decision, and denied the motion for reconsideration. (Appendix 3, District Court Order, 9/10/97)

The Petitioner filed a notice of appeal and a request for a certificate of appealability. The District Court granted the certificate of appealability on December 23, 1997.

The Petitioner filed his brief with the Sixth Circuit Court of Appeals on May 1, 1998. The Petitioner raised on appeal, the single issue that application of the one-year limitations period of the AEDPA

violated his ex post facto protections. On September 10, 1998, a panel of the Sixth Circuit Court of Appeals, in an unpublished opinion, denied the Petitioner's appeal. (Appendix 2, Sixth Circuit Opinion, 9/10/98) The Petitioner filed a petition for rehearing on December 4, 1998. On January 11, 1999, the Sixth Circuit denied the petition for rehearing. (Appendix 1, Sixth Circuit Opinion, 1/11/99)

REASONS FOR GRANTING THE WRIT

I.

The Sixth Circuit erred in holding that the Petitioner's ex post facto protections were not violated by application of the one-year limitations period of the AEDPA

In the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress for the first time, established a one-year limitations period for raising a claim of constitutional error occurring during a defendant's criminal prosecution or sentencing. The 1996 amendments provide in

part:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of --
>
> (1) the date on which the judgment of conviction becomes final;
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactive to cases on collateral review; or
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Prior the 1996 amendments, defendants could bring motions under 28 USC § 2255 without consideration of a time limitation.

The Petitioner submits that his ex post facto protections were violated when the district court denied his motion under 28 USC § 2255 as untimely filed following the passage of the AEDPA, which established

the one-year limitations period for raising constitutional claims under 28 USC § 2255. A plain reading of these amendments, however, would either act to eliminate completely his right to seek redress under the statute, or be inapplicable to old-law cases such as his. Only by judicial construction of a one-year grace period from the effective date of the AEDPA have the 1996 amendments to the federal habeas corpus statute been found to avoid constitutional concerns.

The Sixth Circuit, however, had not issued an opinion on this matter until after the one-year grace period ending on April 24, 1997 had passed. Absent judicial notice concerning the applicability of the statute, the Petitioner was entitled to rely on his settled expectations that he could file his motion under 28 USC § 2255 without regard of the one-year limitations period set forth in the AEDPA in 1996.

In support of his ex post facto claim,

the Petitioner asserts that general principles of retroactivity would limit these new provisions of the AEDPA to cases becoming final after its effective date. The Supreme Court has noted that the appropriate test for determining retroactive effect is whether application of the new statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf v. USI Film Prods., 511 U.S. 244, 280, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229 (1994). This Court noted that making the determination of retroactive effect requires an examination of "the nature and the degree of connection between the operation of the new rule and relevant past event." Id. at 270, 114 S.Ct. at 1499. When making this calculation, courts are to be guided by the "familiar considerations of fair notice, reasonable reliance, and

settled expectations." Id.

In Lindh v. Murphy, __ U.S. __, 117 S.Ct. 2059 (1997), decided after the Petitioner filed his § 2255 motion, this Court clarified how courts should analyze the temporal reach of a newly enacted statute. A court must first consider whether Congress provided a clear and unambiguous statement of its intent to apply the new law to conduct occurring prior to its enactment. This Court noted that the traditional rule requires "retroactive application to be supported by a clear statement." Id. at 2062. The Petitioner submits that Congress failed to provide such a declaration of intent. As this Court noted, "in a world of sild purses and pigs' ears, the Act is not a silk purse of the art of statutory construction." Id. at 2068. Similarly, the court in Stewart v. United States, 973 F.Supp. 764, 767 (M.D. Tenn. 1997), noted, "the Act does not contain clear language

requiring retroactive application of provisions affecting § 2255 motions."

Because Congress has not provided a "clear statement" of its intent, a court must then resort to the normal rules of statutory construction to determine whether the new provision is applicable to the action before it.

> Only where traditional canons of interpretation suggest that a new statutory provision applies to a pending case is it necessary for a court to determine whether such application would have a retroactive effect. Because of the unfairness of imposing new burdens on people "after the fact," a statute that has a retroactive effect should not be applied to conduct that occurred before the statute was enacted.

Williams v. Cain, 117 F.3d 863, 864-65 (5th Cir. 1997); Landgraf, 511 U.S. at 265-66.

This Court has also recognized that

> When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated. We have previously refused to allow technicalities which caused no prejudice to the prosecution to preclude a remand under 28 USC §

> 2106 (1988 ed.) "in the interests of justice." And procedural accommodations to prisoners are a familiar aspect of our jurisprudence.

Stutson v. United States, __ U.S. __, 116 S.Ct. 600, 603, 133 L.Ed.2d 571 (1996).

The Petitioner contends that the one-year limitations period imposed a new burden on him after the fact of his conviction becoming final, which upset his settled expectations that he could file a § 2255 motion at any time.

The Petitioner acknowledges that the "interests of justice" may have been a force behind the district court reading in to the AEDPA a "reasonable time" in which to bring a § 2255 motion for those defendants whose cases were final prior to the effective date of the AEDPA. The Petitioner submits that only through the judicial creation of a "reasonable time" in which to bring a claim after the effective date of the AEDPA, could the district court avoid an impermissible retroactive effect. This judicial creation, however, was not

accompanied by judicial notice to the Petitioner of how long this "reasonable time" was, or when it began to run. Certainly, nothing in amended § 2255 alerted him to the fact that he would have until only April 24, 1997, in which to pursue his constitutional claims. No Circuit had decided a case prior to April 14, 1997, to explicitly hold that an old-law defendant, such as the Petitioner, would be required to file a § 2255 motion on or before April 24, 1997, to avoid the time bar of the AEDPA.

In its decision published on April 14, 1997, the Tenth Circuit first recognized:

> Prior to the amended 28 USC § 2255's effective date, Mr. Simmonds had every right to believe a court would entertain his 28 USC § 2255 motion. Applying the new time limitation to his claim would mean that on the day of April 24, 1996, without prior notice or opportunity to act, Congress stripped Mr. Simmonds' rights and fair expectations as of three years prior to that date. This we cannot allow. A statute cannot retroactively bar a prisoner from his or her ability to have a court consider the propriety of a § 2255 motion without first having a reasonable time to bring the claim;

> additionally, there is no indication Congress intended to foreclose prisoners who had no prior notice of the new limitations period from bringing their § 2255 motions.

United States v. Simmonds, 111 F.3d 737, 745 (10th Cir. 1997).

The court concluded only ten days prior to the expiration date of the one-year period that the limitations period of the AEDPA established the "reasonable time" in which to file a § 2255 motion. Requiring similarly situated prisoners to file their motions within ten days of its decision under the authority of the late-announced standard would indeed implicate all of the notice and fair expectation concerns which the Simmonds court expressed in relation to a strict application of the AEDPA's limitations period. Surely such a result would give little more than lip service to constitutional ex post facto protections.

Should the one-year limitations period be given retroactive application, it would act as a conclusive bar to the consideration of the merits of the

constitutional claims raised in the Petitioner's first § 2255 motion. No other remedy under § 2255 would remain. Due to the ambiguity of the statute concerning its temporal reach, the Petitioner suggests that the rule of lenity apply to permit him an opportunity to raise his constitutional claims and to preserve his protections against an ex post facto law.

CONCLUSION

The Petitioner requests that this Court reverse the findings of the Court of Appeals and the district court, and order that his motion under 28 USC § 2255 be heard on the merits before the district court.

Respectfully submitted,

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APPENDIX

1. SIXTH CIRCUIT COURT OF APPEALS ORDER JANUARY 11, 1999.

2. SIXTH CIRCUIT COURT OF APPEALS ORDER OCTOBER 21, 1998.

3. DISTRICT COURT ORDER SEPTEMBER 10, 1997.

4. DISTRICT COURT ORDER JULY 3, 1997.

CERTIFICATE OF SERVICE

I do hereby certify that three true copies of the foregoing was sent this 12th day of April, 1999, by regular U.S. mail with sufficient postage affixed to the office of:

— Per certificate of service —

Submitted,

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APPENDIX 1
COURT OF APPEALS OPINION (1/11/99)

97-2077

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GLENN VINCENT ELLIS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

FILED
JAN 11 1999
LEONARD GREEN,
Clerk

O R D E R

BEFORE: NELSON and NORRIS, Circuit Judges; and HOOD,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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*Hon. Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

"s/_____".
Leonard Green, Clerk

APPENDIX 2

COURT OF APPEALS OPINION (10/21/98)

NOT RECOMMENDED FOR PUBLICATION

No. 97-2077

FILED
OCT 21 1998
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GLENN VINCENT ELLIS,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

M E M O R A N D U M
O P I N I O N

BEFORE: NELSON and NORRIS, Circuit Judges, and HOOD District Judge.*

PER CURIAM. Glenn Vincent Ellis appeals from the district court's dismissal of his motion filed pursuant to 28 U.S.C. § 2255 asking the court to vacate, set aside or correct his sentence.

---

*Hon. Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Under a literal reading of an amendment to § 2255 found in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which became effective on April 24, 1996, the filing of defendant's motion was subject to a one-year limitations period that began to run on March 1, 1994, the date his conviction was final. His § 2255 motion was filed on April 25, 1997.

The district judge, however, concluded that it would be "constitutionally impermissible to construe the legislation as retroactive without allowing a reasonable grace period to file a § 2255 motion for defendants whose criminal cases were final before enactment." He then held that the reasonable time within which Ellis should be required to file his motion would be within one year of the enactment of the AEDPA. As the one-year grace period expired on April 23, 1997, Ellis' filing was untimely.

We agree with the district court's interpretation of the limitations period

and its application of the facts of this case.

Having had the benefit of oral argument and having carefully considered the record on appeal, the briefs of the parties and the applicable law, we are not persuaded that the district court erred in dismissing Ellis' motion.

Because the reasoning supporting dismissal has been articulated by the district court, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly the judgment of dismissal is **affirmed** upon the reasoning employed by the district court in its Opinion dated July 3, 1997, and its Opinion Denying Motion for Reconsideration dated September 10, 1997.

APPENDIX 3

DISTRICT COURT DECISION (9/10/97)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

97 SEP 10
AM 10.16

GLENN VINCENT ELLIS,

Petitioner,

-vs-

Case No. 1:97-cv-330
Crim Case No. 1:89-cr-29
HON. DOUGLAS W. HILLMAN

UNITED STATES OF AMERICA,

Respondent.
_____/

OPINION DENYING MOTION FOR RECONSIDERATION

On June 23, 1997, this court issued an opinion and order dismissing the motion attacking sentence filed pursuant to 28 U.S.C. § 2255 by petitioner Ellis (hereinafter "defendant"). The matter is now before the court on defendant's motion for reconsideration. Having reviewed each of defendant's supplemental arguments, the motion for reconsideration is **DENIED.**

DISCUSSION

In his motion for reconsideration and supplement to that motion, defendant raises

three additional arguments against applying statute of limitations provision of the Antiterrorism and Effective Death Penalty Act (AEDPA) to cases that were final before enactment of the Act. First, he contends that the Supreme Court's recent decision in Lindh v. Murphy, 117 S.Ct. 2059 (1997), implicitly rejects "retroactive" application of the relevant portions of the AEDPA to his case. Second, he contends that, even if the time limitations of the AEDPA apply, they should not be applied strictly or should be equitably tolled. Third, defendant argues that his criminal proceeding was not final until April 29, 1996, when the Sixth Circuit denied his motion to recall mandate, and therefore the statute of limitations under the AEDPA did not begin to run until that date.

A. Lindh v. Murphy

Nothing about the Supreme Court's decision in Lindh undermines my previous conclusion that defendant's § 2255 motion should be dismissed as untimely.

Addressing a different specific provision of the AEDPA, the Lindh Court determined that Congress did not intend to retroactively apply the procedural limitations of the AEDPA as it amended Chapter 23 of Title 28 to habeas petitions already pending at the time the statute was enacted. Here, in contrast, the question is not whether the procedural limitations of the statute should apply to pending cases, but whether they should apply to cases filed after the effective date. By its plain terms, the statute of limitations provision applies to all § 2255 motions filed after the date of enactment, April 24, 1996. Lindh provides no basis for concluding that Congress intended to exempt from operation of the statute those cases that were final at the time of enactment.

B. Strict Application/Equitable Tolling

The AEDPA applies by its terms to § 2255 motions filed after April 24, 1996. As I noted in my initial decision, however, a number of courts have concluded that

because the imposition of a new statute of limitations "attaches new legal consequences to events completed before its enactment," Landgraf v. U.S.I Film Prods., 511 U.S. 244, 270 (1994), allowing the limitations period to run prior to enactment would be unfair. As a result, courts have concluded that a reasonable grace period must be adopted. See, e.g., United States v. Simmonds, 111 F.3d 737, 746 (10th Cir. 1997) (concluding that one-year period of limitation is itself reasonable grace period). In my initial decision in this matter, I accepted without deciding that a one-year grace period was reasonable.

Defendant contends that a one-year grace period is unduly restrictive. I disagree. Adoption of a one-year grace period is eminently reasonable. The interpretation allows defendants whose cases were final before enactment of the AEDPA to have a period equal to the limitations period set forth under the

AEDPA, regardless of any apparent bar presented by a literal reading of the statute. Defendant cites no case extending a longer period and suggests no basis for this court to reject as unreasonable a limitations period previously determined by Congress to be reasonable.

Moreover, I am unpersuaded by defendant's argument that he was without notice that his claim would be barred by the AEDPA prior to the running of the one-year grace period. As I have noted, notice was provided by the statute itself that habeas cases must be filed within one year of a final decision in a criminal case. Only by arguing that some grace period should apply could any defendant whose criminal case was final before enactment avoid the harshness of the plain language of the statute. Defendant can cite no rational basis for believing that such grace period would be construed to exceed the one-year period contained in the statute itself.

Further, I reject defendant's argument that equitable concerns militate for tolling the statute of limitations in this case. Defendant claims that his attorney had the files for only two months at the time the one-year grace period expired. Such an argument, however, provides no basis for tolling under any generally applicable tolling doctrine. As the Ninth Circuit observed, equitable tolling should "only be granted if `extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time." Calderon v. U.S. District Court, 112 F.3d 386, 391 (9th Cir. 1997). No such extraordinary circumstances exist in the present case.

C. **Date Conviction Was Final**

Defendant's final argument on reconsideration is that his § 2255 motion is timely because his case was not final until April 29, 1996, when the Sixth Circuit denied his motion to recall mandate. As defendant acknowledges, his

direct review process was final when he failed to file a petition for writ of certiorari following the affirmance of his conviction on March 1, 1994. Approximately two years later, defendant sought to recall mandate. Defendant contends that, because he filed a belated motion to recall mandate, his case was not final until that motion was denied.

Defendant's argument is patently frivolous. If a defendant may reinvigorate a final decision by filing a belated motion to recall mandate, the limitations period imposed by the AEDPA would be rendered meaningless.

CONCLUSION

For the foregoing reasons and for the reasons set forth in my prior decision dismissing the § 2255 motion, I find defendant's arguments to be without merit. Accordingly, defendant's motion for reconsideration is **DENIED.**

"s/_____".
Douglas W. Hillman
Senior District Judge

Dated: SEP 10, 1997

APPENDIX 4

DISTRICT COURT DECISION (7/3/97)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

97 JUL -3
AM10.54

GLENN VINCENT ELLIS,

Petitioner,

-vs-

Case No. 1:97-cv-330
Crim Case No. 1:89-cr-29
HON. DOUGLAS W. HILLMAN

UNITED STATES OF AMERICA,

Respondent.
_____/

OPINION

This matter is before the court on the motion of petitioner Glenn Vincent Ellis (hereinafter referred to as "defendant") for leave to supplement his motion under 28 U.S.C. § 2255 for relief from judgment. The government has opposed petitioner's attempt to supplement. It contends that the § 2255 motion, which was mailed on April 24, 1997, should be dismissed because filed beyond the one-year limitations period established in the 1996 Anti-terrorism and Effective Death Penalty Act

("AEDPA"). Specifically, the government contends that the effective date of the AEDPA was April 24, 1996, and that the limitations period therefore ran on April 23, 1997. In the alternative, the government contends that supplementation of the claims is contrary to the purpose of the one-year limitations period.

In response to the government's opposition, defendant contends that the statute of limitations contained in the revised § 2255 is inapplicable to defendants whose cases were final prior to enactment of the AEDPA. He contends that application of § 2255 to final cases results in a deprivation of defendant's remedy that is barred by the Ex Post Facto Clause.

Section 2255, as modified by the AEDPA, provides in relevant part that:

> [t]he limitations period shall run from the latest of --
>
> (1) the date on which the judgment of conviction becomes final;
> (2) the date on which the impediment to making a motion

> created by government action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
> (3) the date on which the right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 (as amended). Because Ellis' appeal was final on March 1, 1994, the statute if applied strictly, would bar defendant's § 2255 motion.

As defendant observes, however, retroactive application of the AEDPA's statute of limitations raises significant constitutional concerns. Of those courts that have addressed the question, only a few have strictly applied the limitations provision, which would completely bar post-enactment motions by prisoners such as defendant whose appeals were final more than a year before passage of the act. See Griffin v. Endicott, 932 F. Supp. 231 (E.D. Wis. 1996) (retroactive application of the

AEDPA's statute of limitations provision does not violate the Ex Post Facto Clause); Curtis v. Class, 939 F. Supp. 703, 708 (D.S.D. 1996). Instead, most have held that the amendments to § 2255 and § 2241 (for state habeas actions) may not constitutionally be applied retroactively, without allowing reasonable time to initiate the action. See United States v. Simmonds, 111 F.3d 737, 746 (10th Cir. 1997) (holding that § 2255 motion was timely if filed within one year of effective date of AEDPA); Calderon v. U.S. Dist. Court, 112 F.3d 386, 389 (9th Cir. 1997) (same); Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997) (petition filed 72 days after enactment date was within reasonable time); Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996) enactment date was within reasonable time); Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996)(holding that a reasonable period for application of the new habeas statute of limitations to already final decisions is one year from

the effective date); United States v. Jones, ___F. Supp. ____, 1997 WL 232201 (D.D.C. April 30, 1997)(citing cases). The Sixth Circuit has not addressed the retroactivity of the statute of limitations provision of the AEDPA. It has, however, retroactively applied other provisions of the statute. See Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063, 1073 (6th Cir. 1997) (applying retroactively the requirement that a defendant obtain a certificate of appealability), cert.denied, ___ S.Ct.___, 1997 WL 134326 (May 12, 1997).

I agree with the majority of courts that have ruled on this issue and conclude that it would be constitutionally impermissible to construe the legislation as retroactive without allowing a reasonable grace period to file a § 2255 motion for defendants whose criminal cases were final before enactment. Absent clear Congressional intent to the contrary, a presumption against retroactive legislation

should apply. Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994). The presumption against retroactivity is "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." Id. at 265. The concerns are based on "considerations of fair notice, reasonable reliance, and settled expectations." Id. at 270. Applying the amended statute of limitations to completely foreclose a remedy previously available to defendant would violate well-established notions of fairness. See Simmonds, 111 F.3d at 745.

Having determined that the court must allow a "reasonable time" in which a defendant may initiate a motion, however, the question remains what period is "reasonable." As I already have noted, a number of the courts addressing the question have determined that, in light of the brief one-year limitations period under AEDPA, it is reasonable to file the motion within one year of enactment of the AEDPA,

which occurred on April 24, 1996. See, e.g., Lindh, 96 F.3d at 866; Simmonds, 111 F.3d at 746.

Assuming that the one-year limitations period is reasonable, the question of when the one-year period expires is problematic. Those courts that have applied a one-year grace period have held that that period expires on April 23, 1997. See Simmonds, 111 F.3d at 746; Lindh, 96 F.3d at 866; Calderon, 112 F.3d at 390; United States v. Jones, ____ F. Supp.___, 1997 WL 232201, **2(D.D.C. April 30, 1997). As a result, the government's present contention that the limitations period expired on April 23, 1997, appears to have substantial support in the case law.

As defendant observes in h is reply brief, however, under Fed. R. Civ. P. 6(a) and Fed. R. Crim. P. 45(a), time ordinarily is computed without counting "the day of the act, event, or default from which the designated period of time begins to run..." If the court were to count time in the

usual manner under Civil Rule 6(a) and Criminal Rule 45(a), the limitations period would run on April 24, 1997. None of the courts that have adopted the April 23, 1997, deadline have discussed why Rules 6(a) and 45(a) would not be applicable here. See Rules Governing Section 2255 Proceedings, Rule 12 (declaring federal civil rules and federal criminal rules of procedure applicable where appropriate).

I conclude, however, that I need not reach this issue. Ellis' § 2255 motion, while mailed on April 24, 1997, was not received by the clerk and filed until April 25, 1997. The date of mailing does not ordinarily serve to toll the running of a statute of limitations unless that mailing was made by a prisoner proceeding pro se. Cf. Meehan v. Rees No. 95-6237, 1997 WL 144217,**1 (6th Cir. 1997) (citing Cooper v. Brookshire, 70 F.3d 337, 379 (5th Cir. 1995) (holding that date of placement of complaint in mail or delivery to prison mail system is date of filing for pro se

prisoners) (other citations omitted). Here, the motion was filed by Ellis' attorney.

Under such circumstances, the statute of limitations ordinarily would not be tolled until the filing of the motion. Cf. Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."); Henderson v. United States, 116 S. Ct. 1638, 1641, n.2 (1996) ("In a suit on a right created by federal law, filing a complaint suffices to satisfy the statute of limitations."). Technically, a § 2255 motion may be a continuation of the criminal case, not an independent civil matter like a state prisoner's § 2254 petition. See Rules Governing Section 2255 Proceedings for the United States District Courts, Rule 3, Advisory Committee Notes on 1976 Adoption. But see Heflin v. United States, 358 U.S. 415, 418 n. 7 (1959) (stating that § 2255 proceeding is an independent civil suit), overruled on other grounds by Peyton v. Rowe, 391 U.S. 54

Since defendant's motion was not received until April 25, the motion is late, regardless of whether the limitations period is considered to run on April 23 or April 24. In no event should this court extend the statute of limitations to defendants whose cases are final before enactment beyond the statutory one-year limitations period that Congress has provided to all other defendants. Such an interpretation of a `reasonable" period would be at odds with Congress' own decision regarding what amounts to a reasonable limitations period for such motions.

While the government did not directly address the motion's timeliness on the basis of the filing date, it has expressly challenged the timeliness of the motion generally. As a result, even if the limitations period is nonjurisdictional, no basis exists for finding waiver of the statute of limitations. Compare Calderon, 1997 WL 197546 at ** 3 (holding limitations

period of § 2255 to be nonjurisdictional and subject to defenses of waiver, estoppel and equitable tolling), with Smith, 62 F.3d at 648 (finding Fed. R. Crim. P. 33 limitation for filing motions for new trial to be jurisdictional). Accordingly, I conclude that defendant's motion pursuant to 28 U.S.C. § 2255 is untimely.

For the foregoing reasons, defendant's § 2255 motion shall be summarily **DISMISSED** pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings because `it plainly appears from the face of the motion...that the movant is not entitled to relief in the district court." Id. In light of the court's decision, defendant's motion to supplement his § 2255 motion is **DENIED** as moot.

"s_____".
Douglas W. Hillman
Senior District Judge

Dated: JUL -3 1997.